(8)

No. 96-1581

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Prior to the federal decision at issue here, the South Dakota Supreme Court had four times found that the Yankton Sioux Reservation had been disestablished; likewise, the South Dakota Supreme Court found disestablishment after the decision at issue here. Respondent Tribe has failed to demonstrate the non-existence of the federal-state conflict as to this "important question of federal law." Further, the Tribe has failed to demonstrate that the federal decision spurning this Court's "cession and sum certain" jurisprudence should remain unreviewed.[1]

I

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SOUTH DAKOTA SUPREME COURT AND THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

According to a recent decision of this Court, a "principal" reason motivating the use of certiorari "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). We review below the Tribe's attempts to avoid the force of this practice.

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[1] South Dakota respectfully suggests that the May 8, 1997, decision of the Tenth Circuit in the post-*Hagen v. Utah*, 510 U.S. 399 (1994) litigation indicates the very practical advantages to the parties, the affected governments and the courts of resolving the conflict at this time. *Ute Indian Tribe v. Utah*, No. 96-4073 (10th Cir. May 8, 1997).

A. Contrary to the Tribe's argument, the South Dakota Supreme Court had decided the disestablishment issue on four occasions prior to the federal court decision.

The Tribe argues that, prior to the federal case at issue here, the South Dakota Supreme Court had "never fully decided" the diminishment issue. Respondents' Brief (RB) 12. The allegation is without merit; the South Dakota Supreme Court in fact had decided the issue four times before the recent federal decisions.

In *Wood v. Jameson*, 130 N.W.2d 95, 99 (S.D. 1964), the South Dakota Supreme Court held, when denying a writ of habeas corpus:

> Construing the Indian treaty and the 1894 ratifying Act together we think it was the purpose of Congress to disestablish the reservation. . . .

In *State v. Williamson*, 211 N.W.2d 182, 183 (S.D. 1973), a tribal member defendant appealed on the ground that his offenses occurred "within the boundaries of the Yankton Sioux Reservation." The South Dakota Supreme Court held that the "Act of 1894 disestablished that portion of the Yankton reservation which was ceded and sold to the United States. . . ." *Williamson*, 211 N.W.2d at 184. In *State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977), the Court recognized the existence of limited "Indian country" in the area by virtue of 18 U.S.C. § 1151(c) but stated flatly that "this Court has ruled that the Yankton Indian Reservation was disestablished. . . ."

Finally, in 1984, in *State v. Thompson*, 355 N.W.2d 349, 350 (S.D. 1984), the Court addressed this question: "IS THE YANKTON SIOUX RESERVATION DISESTABLISHED?" (Emphasis in original.) The Court examined the 1894 Agreement, decisional law including *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and its own cession

precedent. The South Dakota Supreme Court found that its disestablishment methodology was the "same" as that adopted by this Court. *Thompson*, 355 N.W.2d at 351. The Court thus found the reservation to be disestablished and affirmed the conviction. *See also State v. Greger*, 559 N.W.2d 854, 860 (S.D. 1994), App. 138-139 (reviewing the four state court decisions); Dissent, App. 61 and n.38.

These decisions of the South Dakota Supreme Court as to the "meaning" of "federal law," *Braxton*, 500 U.S. at 347, provide an adequate basis for the grant of certiorari jurisdiction on the basis of the subsequent conflict created by the federal opinion now before this Court. S.Ct. Rule 10(a).

The Tribe's assertion that the South Dakota Supreme Court had not "fully decided" the disestablishment issue is apparently based on a theory that no disestablishment issue is "fully decided" unless each provision of an agreement is individually addressed. *See* RB 8, 12. No decision of this Court, however, has ever required such a separate analysis. Indeed, the majority opinion below omits any reference to thirteen of the twenty provisions in the 1894 Agreement. The Tribe's argument falls under its own weight.

B. Contrary to the Tribe's assertions, the Tribe, not the State, initiated the actions which created the conflict.

The Tribe asserts that the *State's* actions somehow created the conflict between the federal and state courts. RB 10, 12, 13. This is inaccurate. Prior to the federal decisions at issue here, the South Dakota Supreme Court had four times found the Yankton Reservation disestablished, as we set forth above. *Subsequent* to those decisions, in the instant litigation, the *Tribe* "sought a declaratory judgment that the boundaries established in

the 1858 treaty still define the extent of the reservation. . . . " Majority Opinion, App. 4. The Tribe, not the State, sought this conflict.[2]

C. Contrary to the Tribe's assertions, *State v. Greger* solidly reinforced the conflict which came about as a result of the decision of the federal courts.

The Tribe goes to some length to dissuade this Court from consideration of *State v. Greger*, App. 125, in which the South Dakota Supreme Court unequivocally maintained the conflict created by the federal decision at issue here. First, the Tribe appears to argue that once a federal court has made a decision on a federal issue, the state courts are required, as a matter of *state* law, to follow the prior federal decision. RB 11-12. We note that this argument was made by the defendant and rejected in *Greger*, App. 135, n.5:

> We do not consider ourselves bound, however, by the Eighth Circuit's decision, for as the United States Supreme Court held in *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696, 715 (1989):
>
> > state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.

The Tribe in effect complains that by following *Asarco*, the South Dakota Supreme Court undermined certain of its own *state court* precedent. Whatever the accuracy of that assertion, the South Dakota Supreme Court certainly did

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[2] Of course, the defendant in *State v. Greger* (and not the State) raised the disestablishment issue in state court. *Greger*, App. 135.

not err by conforming its practice to the holdings of this Court.

Second, the Tribe appears to argue that the principles of "collateral estoppel" are somehow relevant here. RB 20-24. The Tribe's actual argument is presumably that the South Dakota Supreme Court in *Greger* should have, on the basis of "collateral estoppel," followed the recent decision of the lower federal courts. The South Dakota Supreme Court decision in *Greger* is not, however, on review here. The Tribe's argument is thus badly misplaced.

The Tribe also implies, without citation of authority, that it should have the benefit of "collateral estoppel" in this case *because* it did not participate in *Greger*. RB 23-24. The Tribe was well aware of the *Greger* litigation, (and does not claim otherwise), and evidently chose not to participate as amicus.

II

CERTIORARI SHOULD BE GRANTED TO CORRECT THE DIVIDED PANEL'S MISUNDERSTANDING OF THIS COURT'S DISESTABLISHMENT JURISPRUDENCE.

A. Contrary to the Tribe's position, the use of "cession and sum certain" language in a surplus land act creates an "almost insurmountable presumption" of disestablishment.

This Court has adopted the principle that when "cession and sum certain" language is adopted in a surplus land act, an "almost insurmountable presumption" of disestablishment is created. *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984); *Hagen v. Utah*, 510 U.S. 399, 411 (1994). Because Articles I and II of the 1894 Yankton Act contained language of "cession" of land for a "sum certain" the "almost insurmountable presumption" arose. App.

112-113. Like the majority below, *see* App. 13, 14; *see also Dissent*, App. 47, n.30, the Tribe credits the *State of South Dakota*, and not this Court, with recognition of the presumption.[3] RB 3. We need hardly point out the error of this approach.

The Tribe also offers, necessarily without citation of authority, a theory that "cession and sum certain" language amounts to a "juridical ouija board" which comes into play only in the absence of a savings clause. RB 17. In the presence of the savings clause, the Tribe's argument continues, "cession and sum certain" language is simply irrelevant. *See id.* The Tribe's theory simply cannot be squared with *Solem* and *Hagen* which recognize the very weighty presumption of disestablishment created by "cession and sum certain" language. *See also DeCoteau*, 420 U.S. at 445.[4]

B. Contrary to the Tribe's position, the issue before this Court – the proper interpretation of the 1894 Act – is a question of law and is not "totally fact driven."

The Tribe alleges, without citation of authority, that:

> The determination of whether language of surplus land sales agreements either diminishes or retains a reservation's boundary is totally fact driven.

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[3] According to the Tribe, "the *State* relies on what *it* terms, 'cession and sum certain' language in the 1894 Act that creates, *in its words*, 'an almost insurmountable presumption' of diminishment." RB 3 (emphasis added).

[4] The State respectfully submits that the weakness of the Tribe's argument and of the majority decision below as to this central point suggests that this Court may wish to consider whether this case is appropriate for summary reversal.

RB 8-9. This is incorrect. The interpretation of an agreement of the United States with an Indian Tribe which has been incorporated in a federal statute is certainly a matter of law. *See Sioux Tribe v. United States*, 500 F.2d 458, 462 (Ct.Cl. 1974). *See generally Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 639 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 577 (1994). It is, of course, the failure of courts below to respect this Court's exposition of the law of disestablishment which has given rise to the present Petition.

The Tribe further alleges that the essence of the State's case is a disagreement with the factual findings of the court of appeals. *See* RB 9, 16. The Tribe, however, fails to specifically identify any alleged factual dispute. The Tribe at RB 9, cites the State's Petition, 24-26, as a source for its contention as to the "factual findings" in dispute, but these pages emphasize the *agreement* of the majority with the position that the State, and not the tribe, has consistently exercised jurisdiction over the non-Indian lands within the area.[5] *See also* App. 38-39. The critical importance of this factor is noted in *Hagen*, 510 U.S. at 420-421, and *Rosebud*, 430 U.S. at 603.

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[5] State's Petition, 26, n.16, does refer to a tribal "claim" which the court of appeals does not resolve. The State has pointed the correct way to the disposition of that claim in the footnote, and the tribe does not refute the state's assertion that it would be improvident to rely upon the tribal claim. *Id.* We note further that RB 18 seems to suggest that, although the *state* has exercised jurisdiction, this is not "inconsistent with the existence of jurisdiction of the tribal, state, and federal government." No *evidence* to support "shared" civil or criminal jurisdiction is cited, however, and the record is to the contrary. *See* State's Petition 24-25; App. 38-39; DCO, App. 88.

C. The Tribe has failed to disturb the accuracy of the historical record presented by the State.

The Tribe as a practical matter concedes the accuracy of the historical record presented by the State.[6] Certain of the Tribe's attempts to augment that record, however, deserve response.

First, the Tribe seems to imply that, because the 1858 Treaty with the Tribe set out boundaries and the 1894 Act did not, this implies no change in the boundaries. RB 6. The opposite implication, however, assuredly arose – the elimination of boundaries in the 1894 Act meant exactly that there *would be* no boundaries. *See generally DeCoteau*, 420 U.S. at 452 (boundaries in 1867 Treaty); *id.*, 420 U.S. at 455-460 (no boundaries in 1891 Act); *Rosebud*, supra.

Second, the Tribe implies that the Agreement was somehow tainted by "allegations" of bribery. *See* RB 4. The Tribe fails to note that the "allegations" were rejected by Indian Inspector Cadman, whose report was submitted to Congress, along with the negotiation record. Ex. Doc. 27, 53 Cong., 2d Sess. (1894), p. 38. *See also Yankton Sioux Tribe v. United States*, 623 F.2d 159, 176 (Ct.Cl. 1980).

Third, we note the agreement of the Tribe that the "cession and sum certain" arrangement was adopted over the "appraisal and sale" method. *See generally* RB 4-5, 16-17. *See also Yankton Sioux Tribe*, 623 F.2d at 176 (Tribe's attempt to induce Claims Commission to treat 1894 Agreement as "appraisal and sale" rejected). The use of this "cession and sum certain" arrangement was, of

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[6] The Tribe argues only that, although it used but 25 pages of its 30 page brief, "[s]pace does not allow Respondents to correct every misrepresentation of the historical record made by the state." RB 7. The Tribe does not, however, pause to "correct" any alleged "misrepresentations." Rather, the Tribe has "invite[d]" this Court to make its own analysis of the voluminous record. *Id.*

course, "precisely suited" to disestablishment. *DeCoteau*, 420 U.S. at 445.

D. The Savings Section does not operate as the Tribe argues.

The Tribe's discussion of the language of the savings section is flawed because it fails to point out that the savings section is *itself* ambiguous and thus not nearly as strong as the Tribe claims. While the section contains language which indicates "preservation of all provisions of the said Treaty of April 19, 1858," it also contains language which provides for preservation of "annuities under the said treaty of April 19, 1858." App. 120. If the first passage means what the Tribe has argued, the second passage is entirely superfluous. The savings section is thus internally ambiguous, a significant point which the Tribe fails to discuss. *See* RB 7, 14-16.

The Tribe also incorrectly asserts that "neither the State nor the Tribe" could find agreements which contained "similar language" or "language as strong, or with as much force as the savings clause at issue here." RB 7. *See also* RB 14-15. The Tribe, and majority below (*see* App. 20), unaccountably failed to address the two Crow Tribe clauses set out verbatim at Petition 19-20 which were, according to the Dissent, App. 50, n.31, "similarly 'strong.' " Moreover, we submit, in fact, that the ambiguity of the savings section here renders it substantially *weaker* in effect than those of the Crow Agreements (which did not themselves prevent diminishment), and further makes it analogous to or "similar" to the five sections cited by the Tribe at RB 14-15, among many others. *See also Oregon Wildlife Department v. Klamath Tribe*, 473 U.S. 753, 760-770 (1985) and *Rosebud*, 430 U.S. at 623 (Marshall, J. dissenting) (indicating the narrow effect given savings sections generally).

The Tribe finally relies upon its own ambiguity argument. *See* RB 16. As we point out above, that ambiguity, if it exists at all, arises from the savings section *which is itself internally ambiguous*. The Tribe cannot, moreover, rely on the canons of construction. As explained in *DeCoteau*, 420 U.S. at 447: "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." Because Article XVIII is itself ambiguous, the canons of construction certainly do not allow it to overcome the strong presumption of disestablishment created by "cession and sum certain" language.

In sum, the Tribe has failed to overcome the Dissent's analysis, App. 55-56, that the majority's construction of the savings clause

> is based neither on the text – which referred only to annuities – nor the legislative history of the 1894 Act, and has as its source, as best I can discern, a single-minded desire to avoid diminishment at all costs.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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